

## BOARDS OF INQUIRY

AQUIL LASANI

Complainant

ONTARIO HUMAN RIGHTS COMMISSION

Commission

THE MINISTRY OF COMMUNITY AND SOCIAL SERVICES

Respondent

## DECISION

BOARD OF INQUIRY J. House

APPEARANCES:	Fiona Campbell	Counsel for the Ontario Human Rights Commission
	Harriet Simand	Complainant
	Marsha Gottersman	Respondent

By letter dated August 18, 1992, I was appointed by The Minister of Citizenship to sit as a Board of Inquiry with respect to complaints made by Mr. Aquil Lasani that he has been discriminated against in employment. Mr. Lasani's two complaints, of April, 1987 and January 1989, alleged that he was discriminated against on the grounds of race, colour, ancestry, place of origin and ethnic origin contrary to ss.5(1) and 9 of The Human Rights Code.

The original complaints were made against the Ministry of Community and Social Services (herein after The Ministry) and two individual employees thereof. On November 16, 1992, counsel for the Human Rights Commission requested that the complaints against these individual employees be withdrawn, leaving only the Ministry as Respondent. There being no objection, this was done.

#### The Position of the Human Rights Commission and Mr. Aquil Lasani

The Human Rights Commission contended that Mr. Lasani had been a victim of systemic discrimination on the basis of race, colour, ethnic origin, place of origin, or ancestry. It alleged that Mr. Lasani, who was born on the Indian subcontinent, and is of East Indian ancestry, was discriminated against on that ground. In the context of this case, it is immaterial whether the ground ought to be described as race, ethnic origin, ancestry, or colour. The Commission is fundamentally alleging that these overlapping aspects of Mr. Lasani's identity have led the Ministry to treat him in a discriminatory manner. For ease of expression, I propose to refer to these overlapping characteristics as "race" or "ethnic origin" in these reasons, with each term representing all of the alleged unlawful grounds of discrimination.

#### I. The Commission's case:

The evidence The Commission's case was presented through the evidence of four witnesses. Two of these, Mr. Lasani and Phyllis Tiffany, gave factual evidence, and two, Prof. Himani Bannerji and Ms. Nan Weiner gave expert opinion evidence with respect to racism and employment equity.

As well, I was presented with several books of exhibits by the Commission, as well as numerous other documents which were made exhibits during the course of the hearing.

It will be most convenient to summarize the evidence of Aquil Lasani first.

a) Aquil Lasani

Mr. Lasani testified that he was born in India, and has a degree in law from Bombay University, and a Master's degree in Social Work from Tata Institute of Social Sciences, a highly respected institution there. He worked for many years in Bombay City and in the Province of Bombay, where, among other things, he worked as a supervisor for a welfare centre with a staff of 100. There, he dealt with employees grievances and gave advice on labour-management relations. From 1956 to 1965, he worked as personnel manager at a Bombay Labour Office, where he had 12 assistants with approximately 200 persons overall working under his authority.

In 1965, Mr. Lasani came to North America, and, after a short period in Cleveland, U.S.A. he came to Canada in 1967. His first job in Canada was at the Brantford General Hospital, where he was employed as a psychiatric social worker. He stated that he left because this context was one in which advancement would be difficult, and in 1971 he accepted a job with the Ministry of Community and Social Services as Vocational Rehabilitation Counsellor.

Mr. Lasani testified that he took this position, which he did not consider consistent with his experience, or skills, with the hope that he would rise in the Ministry.

He, testified that during the years he was employed at the Ministry, he applied for numerous positions of a managerial kind, and was either refused an interview for the position, or, if interviewed, was not the candidate selected. Some of these positions were with the Ministry in the Hamilton area, and others were affiliated with different regional offices of the Ministry, such as Peterborough or Barrie. It was Mr. Lasani's view that, without exception, he had done well in the individual interviews, and could see no reason why he was not given the positions applied

for. He indicated that, while at the outset he assumed that others were more qualified than he, eventually he was forced to the conclusion that there was no rational reason for his continued inability to advance, other than his race or ethnicity.

Mr. Lasani testified that he applied thirty times for a promotion within the Ministry, without success. These applications began in 1973, and continued until January, 1990. Eleven of the applications were for Vocational Rehabilitation Supervisor, and nineteen were for Programme Supervisor. Vocational Rehabilitation Supervisor is the position immediately superior to Vocational Rehabilitation Counsellor in the Ministry's hierarchy, while Programme Supervisor is at least two, and perhaps several levels higher in the promotional hierarchy.

Mr. Lasani testified that he applied in 1973 for a VRS Supervisor's position, was granted an interview, but was not selected. Again in 1977, he applied for a VRS Supervisor's position, but was not selected. Between 1977 and October, 1983, he applied for ten different positions as a Programme Supervisor. There was no evidence that he applied for any VRS Supervisor's positions during those years. He applied for a developmental VRS Supervisory position in October, 1983, and then, in the years 1984 and 1985, applied only for Programme Supervisor positions. During the last five years of his employment, he applied for a mixture of VRS Supervisor and Programme Supervisor positions.

Mr. Lasani testified that he had been excellent in his position as VRS counsellor, and that this had been recognised by his immediate supervisors, and that he had been innovative and had shown initiative in several respects. The most significant of these was Mr. Lasani's reorganization of the intake function in the Hamilton VRS office in 1980 or 1981. Mr. Lasani's reorganization of the position led to a substantial reduction of the waiting list for VRS Services. Subsequent to that date, Mr. Lasani's caseload as VRS counsellor was reduced to a half-caseload, to allow him to perform the intake function. Secondly, Mr. Lasani prepared a flow chart indicating a number of disabilities encountered in VRS counselling work, as well as possible services which the counsellor could consider. This Chart is found at Doc. Book #3, Tab. 13, pages 103-106. As well, there was evidence that Mr. Lasani supervised a social work

student, was appreciated by his clients, and was, on occasion consulted for advice by one of his supervisors, Noreen Toye (see Exh. Book 3, Exh. 3(g)(i); Tab. 12, p.97).

It was Mr. Lasani's view that his lack of advancement could be explained only by racial/ethnic discrimination. While the Commission asked me to infer this from the pattern of rejections of Mr. Lasani's applications for advancement within the Ministry, Mr. Lasani stated that he felt that one of his supervisors, Goldie Verhaege, was racially prejudiced, and that Al Strang, the Area Manager in the 70s and early 80's, had sometimes behaved inappropriately. With respect to Ms. Verhaege, Mr. Lasani indicated that he felt she was prejudiced because she had given him an unfair performance appraisal, and also because she once made derogatory remarks about an East Indian woman. It was unclear from his evidence what derogatory remark was made. With respect to Al Strang, Mr. Lasani stated that once he had gone to Mr. Strang's office with respect to something Mr. Lasani had allegedly failed to do, and Mr. Strang "had a temper tantrum" and said that Mr. Lasani ought to get a hearing aid. On another occasion, Mr. Strang gave a speech at a retirement party, and made a joke at Mr. Lasani's expense, suggesting that the new supervisor would inherit the Lasani discipline problem. Mr. Strang then came to Mr. Lasani and asked him not to take offence, as the speaker was expected to make some jokes. Mr. Strang left the Ministry in 1986.

b) Phyllis Tiffany

The second witness was Mr. Lasani's supervisor during the years 1983-1985, Phyllis Tiffany. Ms. Tiffany testified that Mr. Lasani had been an excellent employee, highly deserving of advancement. She testified that performance appraisals dated June 7, 1984, May 24, 1985, and July 15, 1986 represented her view of Mr. Lasani's work during the period she supervised him. Those performance appraisals are contained at Tab. 6, Document Book 3, pp 44-55 (Exh. 3(c)(iv), 3(c)(v), 3(c)(vi). There had been some question as to this, since the performance appraisals were to be completed by the supervisor and the employee jointly, and, in Mr. Lasani's case, were written in part, at least, in the first person, i.e. "I was instrumental in revising and recasting a) intake form b) inquiry form c) initial memo d) assignment forecast; these were adapted and appreciated by all concerned", "I was advised by Ontario Civic Service

Commission to participate in their management workshop. I am looking forward to it.", etc.

Ms. Tiffany indicated that, as a person of integrity, she would not have signed these appraisals if she did not agree with them, and her testimony left no doubt that she felt that Mr. Lasani merited advancement in the Ministry, on the basis of his performance under her. She stated that on one occasion, she had spoken to the Direct Services Manager, Mr. David Vice and had done her utmost to convince him that Mr. Lasani merited promotion, and that it was unfair that he had not been promoted. Ms. Tiffany did not, however suggest that racial or ethnic bias was brought up in her discussions with Mr. Vice. Nor did she believe that she had ever heard racially derogative comments from any of Mr. Lasani's colleagues or supervisors. She stated that she had heard clients of Mr. Lasani make unacceptable remarks concerning his ethnicity. Ms. Tiffany testified that she became Mr. Lasani's supervisor following a competition held on October 1983, and in 1986 was given an acting Programme Supervisor position. However, she was never successful in obtaining a full Programme Supervisor's position, and eventually returned to her country of origin, the U.S.A.. At one point in her evidence, Ms. Tiffany was asked her opinion of the likelihood that a person working as a Vocational Rehabilitation Counsellor would be appointed as a Programme Supervisor without any intervening position such as VRS Supervisor. She appeared to be quite taken aback by the suggestion, and indicated that such a promotion would be extremely unusual.

c) Prof. Himani Bannerji

Mr. Lasani's case also benefitted from the expert evidence of two witnesses. The first, was Dr. Himani Bannerji, a professor of sociology at York University, qualified as an expert on race and racism.

Dr. Bannerji prepared a report concerning Mr. Lasani's case, which was made Exhibit 4 to the hearing. She also testified viva voce.

Dr. Bannerji stated that while sociology is the study of social processes in general, and therefore individual cases do not receive great stress, nonetheless (to quote her Report) "nothing social

can exist in general. It is through particular instances that this abstraction called "the general" gained from observation, documentation and experience, comes into being."

In Dr. Bannerji's view, it is appropriate to begin the inquiry with the given that racism exists. Then, to quote her Report, "Our task then is to take the case of Mr. Aquil Lasani in terms of his complaint of racism against his work place as an individual example of what in general is admitted to exist and find out how in particular this may be the case for him." For her (Report, p.4) "we must remind ourselves that our project is not to prove that racism exists in Canada, but that Mr. Lasani in particular is a victim of it".

Dr. Bannerji's methodology involved interviewing Mr. Lasani, interviewing counsel for the Commission and Mr. Lasani, and reviewing part of one of the competition files (AD 19/86) which document an impugned competition. Appendix 1 to her Report includes a full list of documents she consulted in arriving at her conclusion, which was that, absent any other explanation, and in view of the coherence between an ideal environment in Canada for racism and what happened to Mr. Lasani, "I cannot but come to the conclusion that his claim of racist treatment is justified" (Report, p. 21).

d) Ms. Nan Weiner

A second expert witness, Ms. Nan Weiner, also gave evidence. She is a consultant in employment equity who has a Ph.D. degree from the University of Minnesota in Human Resources, who has taught a Pay Equity course at the University of Toronto since 1986. She was qualified by me as an expert in employment equity. Her Report on Mr. Lasani's case was made Exhibit 23.

Ms. Weiner analyzed the two competition files which were placed in evidence to ascertain whether the selection procedures used were appropriate, or whether, on the contrary, they were sufficiently arbitrary to allow the intrusion of ethnic bias. Her Report identified 5 steps which are recognised as appropriate for a fair structured interview. They are:

- 1) Develop questions based on a job analysis;

- 2) Ask the same questions of each candidate;
- 3) Anchor the ratings scales for scoring answers with examples and illustrations;
- 4) Have an interview panel record and rate answers;
- 5) Consistently administer the process to all candidates; and
- 6) Give special attention to job relatedness, fairness, and documentation.

An analyzing the two competitions referred to, Ms. Weiner concluded that, with respect to the 1986 competition, interviews were granted to those who possessed a Master's degree, while those without a Master's degree were not interviewed. While directly contrary to a Ministry Policy against "academic credentialism", this impropriety had no negative effect on Mr. Lasani, who possessed the Master's degree, and may, in fact, have assisted him.

Ms. Weiner testified that the first two areas, i.e. the development of appropriate questions and asking the same questions of each candidate, were correctly dealt with by the panel doing the interviews. She had some concerns about points three and four, as the panel rated the answers of the candidates, but did not record their answers. This removes the possibility that answers can be reviewed subsequently to insure that scoring was fair. Ms. Weiner was unable to ascertain from the documentation provided whether standards were administered consistently, and felt that the interview process would have benefitted had a human resources person been part of the interview panel. Her ultimate conclusion as set out in her Report (Exhibit 23) was that the cumulative effect of the various policies adhered to could result in both perceived and actual instances of systemic discrimination (p.29).

## II. The Case for the Ministry of Community and Social Services

The Respondent called four witnesses who gave direct evidence: Annette Twist, Margaret Streiker, David Vice, and Don Cornish. An expert witness, Judith Davidson-Palmer, was qualified by me to give opinion evidence concerning Human Resources, Human Rights, and Employment Equity. As well, voluminous materials were provided including a Report of the expert witness, back-up material relied upon by the expert, and the personnel files of various

of Mr. Lasani's competitors for promotion.

a) Annette Twist gave general evidence about the positions of VRS counsellor, VRS supervisor, and Programme Supervisor. She herself had been a VRS counsellor, a VRS Supervisor (ie. the equivalent, "Team Manager") and an Acting Programme Supervisor before obtaining even higher managerial responsibilities. She testified that while VRS counsellors are direct providers of vocational rehabilitation services, VRS Supervisors are involved in such things as funding decisions, supply and services as well as the human resources management which is the core of the position. This latter core area involves recruiting staff, motivating them, and providing them with appropriate appraisal and discipline. There is also a significant community outreach component of the job, and the VRS Supervisor is expected to establish good relationships with other agencies, and to ascertain the existence of any significant service gaps.

By contrast, she said, Programme Supervisor is a senior management position. The Programme Supervisor is the representative of the Minister in a given area, and conversely, the link between the field and the Minister's office. A Programme Supervisor is expected to identify any contentious policy issues developing with respect to the Ministry's overall responsibilities, and provide exact, clear information to the Minister's office for analysis. The Programme Manager has substantial ongoing contact with the Boards of Directors of many agencies which are largely funded by the Ministry. They are to provide input into the structures of these agencies, provide advice as to budgeting and staffing, and to set up mechanisms to monitor the programmes and finances of individual community agencies. Obviously, qualities such as diplomacy, negotiation and mediation would be useful for these purposes.

She said she had had professional contact with David Vice, and Don Cornish, and that she had never heard any racial slurs from them. She felt that Mr. Lasani was somewhat weak in liaison and networking skills, as this "was not a priority with him".

b) Margaret Streiker also testified. Now employed elsewhere, she had worked for the Respondent from 1968 to 1988, including a five year period as VRS Supervisor in Hamilton.

In addition, her subsequent career with the Ministry as Community Programme Manager put her in a position of sitting on a number of competition panels before which Mr. Lasani competed for advancement.

She testified that she recalled that, comparatively speaking, Mr. Lasani did not do well in the competitions on which she sat. She said that he seemed unable to explain how his previous experience was applicable to the new job, and did not convey knowledge of the position applied for. She stated that, with respect to the position of Programme Supervisor, he had neither the conceptual ability nor the toughness for the job. For example, she said, the Programme Supervisor may be called upon to represent the Ministry to the community on many difficult issues, such as the death, while in care, of a disabled child. In her view, Mr. Lasani would not have been capable of fulfilling this and similar demanding requirements of the job.

She also testified that she knew Al Strang, who also was a panelist in the impugned competitions, for many years, and had never heard him make racially derogatory comments, or, in fact, any negative comments at all about Mr. Lasani.

c) David Vice testified at length. After an eight-year period as Assistant Manager of the St. Joseph Hospital in Hamilton, where he oversaw the efforts of approximately 2,000 staff, he joined the Ministry, in 1975, and by 1986 was Direct Services Manager for the Hamilton, Brant, and Niagara Regions. At present, he is responsible for five Ministry offices.

Ms. Vice stated that he was able to make a judgment about Mr. Lasani's job skills over the last five or six years of Mr. Lasani's employment in the Ministry. In his view, Mr. Lasani tended to be weak in his liaison both with other Ministry community programme units, such as Family Benefits, as well as in external liaison. In his view, a VRS Counsellor ought to meet with other agencies to explain VRS and its parameters to them, and observe the external agency in action. He firmly rejected Mr. Lasani's view that external liaison simply brought in a wave of referrals which would lengthen the waiting list. Rather, he said, agency appreciation of what VRS could, and could not, do, was crucial to insure that referrals were made up of those who could be

helped.

Mr. Vice recognised that Mr. Lasani had revamped the intake procedure with some success, but stated that he felt caseload counselling and decision making are more demanding areas. He stated that once Mr. Lasani began to do one 1/2 intake, and 1/2 VRS counselling, he never requested to be returned to a full counsellor's role.

Mr. Vice noted that while Mr. Lasani had sought Ministry funding to enable him to attend management preparation courses, many frontline staff would take community college courses at their own expense. Mr. Vice gave the example of the Mohawk College course, "Effective Supervision" which he himself was involved in developing, and which he felt gave useful "hands-on" training to prospective managers.

Mr. Vice explained that he would, as part of his job, counter-sign performance appraisals by supervisors, and had done so on several occasions for Mr. Lasani's appraisals. he admitted that, on one occasion, he had "suggested" to one of Mr. Lasani's supervisors that an appraisal ought to be reconsidered to "allow room for growth". He stated that he did not do so because of the then-pending Human Rights complaint, but rather because the supervisor, Mr. Marsden, was relatively new, and inexperienced in giving performance appraisals.

With respect to Mr. Lasani's performance in the various competitions on which Mr. Vice sat, he indicated that he recalled that Mr. Lasani seemed uninformed as to the content of the position he had applied for. For example, in a competition involving service to children only, he said Mr. Lasani seemed unaware as to what handicapped children's benefits are.

Mr. Vice stated that, in contradistinction to bargaining unit positions, in management competitions seniority was given very little weight. While there are definite career paths in the Ministry, it matters very little whether one has functioned four, or fourteen years in a stepping-stone position, as long as the skills of the position had been mastered.

d) Don Cornish, the Area Manager for Hamilton, was also called as a witness. He testified that he recalled, in general terms, Mr. Lasani's performance in at least two competitions. He indicated that his general impression of Mr. Lasani was that Mr. Lasani presented his paper qualifications and background in the Ministry as being the basis for his being qualified for a new position, without a fully-thought out idea of what the new job would entail. In contrast, he recalled that one of the successful candidates, Mr. Beauchamp, explained in a fairly concrete way how he would approach the position. He stated that all questions were prepared beforehand, all questions were asked of each contestant, and each answer was noted and graded individually. He indicated that there was no improper attempt, by D. Vice or anyone else, to interfere with the grading or to influence the outcome of the competition. He denied any suggestion that Mr. Vice or anyone else had ever made racial slurs about Mr. Lasani. In cross-examination Mr. Cornish stated that he had taken a "cultural sensitivity" course in the early 1980s, called "Breaking the Glass Ceiling".

e) Judith Davidson-Palmer was qualified as an expert on human resources, human rights and employment equity. She is a consultant on these matters, and has been consultant to the Ontario Human Rights Commission and the Canadian Human Rights Commission, among others, on these issues. Her Report, Exhibit R-25, was made part of the record. That Report included an analysis of the Ontario Public Service context [Ch.2.2] during some of the relevant years. There, it is noted that the Ministry in the mid 1980s faced a reduction in its separation/turnover rate from 16% to 4% per annum, and a median workforce age of 39 years. A review by the Ministry's Human Resources Secretariat found that upward mobility in the Ministry was becoming increasingly restrictive, and management had reached 20% of the Ontario Public Service. In June of 1988, further measures were introduced to make the public service more representative of the public in Ontario, by recruiting more women and minority group members from outside the public service.

The reduction of separations and a concentration of long service middle managers under age 45 resulted in a highly competitive promotional environment.

In her Findings, (Ch.4-1) at p.19, Mr. Davidson-Palmer provides a chart showing career paths within the Ministry, 1988 to 1992. That chart shows that while almost all VRS Supervisor promotions (PSW - 17) involved people who occupied positions classified social worker 2 [10104] only 2.8% of Programme Supervisor [ASL-19] promotions involved a direct advance from social worker 2 positions. Given that 68% of the jobs for which Mr. Lasani applied were Programme Supervisor positions, Mr. Davidson-Palmer concludes that his chances of obtaining such a position were extremely limited, and that this was so for reasons having nothing to do with discrimination.

On pages 22-25 of her report, the witness reproduces relevant Statistics Canada information concerning representation of visible racial minorities. 8.6% of all Ontarians belonged to such a minority in 1986, and 3.6% of those who live in the "extended Hamilton area" were so designated. In comparison, 8.3% of Income Maintenance Supervisors, 25% of VRS Supervisors, 10% of Social Programme Administration (ASL 18) and no Programme Supervisors belonged to visible minorities in June, 1989. By September 1991, the 10% minority representation in ASL 18 had become 0%, while the 0% in ASL 19 (Programme Supervisors) had become 10%. As Ms. Davidson-Palmer put it, because of small numbers, a reduction in one category may indicate upward mobility to another.

With respect to the competitions for which full documentation exists, Ms. Davidson-Palmer fully analyzed competition AD 19/86, and concluded that while there were some discrepancies in the selection process, there was no evidence of unequal treatment on the basis of race/ethnicity. With respect to competition AD 31/88 (Programme Supervisor AM-19), she concluded that Mr. Lasani's credentials did not approach those of the successful candidate, and that there was no evidence of discrimination on the basis of race/ethnicity.

### III. The Law

Mr. Lasani's complaints were brought under what are now sections 5(1) and 9 of the Human Rights Code, R.S.O. 1990, c. H-10. Those enactments read as follows:

#### EMPLOYMENT

5. -(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, age, record of offenses, marital status, family status or handicap. 1981, c.53, s.4(1); 1986, c.64, s.18(5).

#### INFRINGEMENT PROHIBITED

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. 1981, c.53, s.8.

It is the position of counsel for the Commission and for Mr. Lasani that he was the victim of direct, systemic discrimination. Discrimination has been defined in numerous cases, but perhaps most fundamentally by McIntyre, J. in Andrews v. Law Society of British Columbia, 1989 1 S.C.R. 143 at 174:

I would say then that discrimination may be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group, not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's achievements and capacities will be rarely so classed.

It will be seen from this definition that it is immaterial whether or not discrimination is intentional.

The Supreme Court of Canada has made it clear that a Board of Inquiry is to examine, not the cause of discrimination, whether it be overt malice, subconscious reliance on stereotypes, or blind adherence to traditional practices, but the result:

"There can be no doubt that Canadian human rights legislation is now typically drafted to avoid reference to intention. As noted previously, the Canadian Human Rights Act is addressed to "discriminatory practices". The Ontario Human Rights Code, R.S.O. 1980, C.340, seeks to uphold the "equal dignity" of all men and women by preventing discrimination. In Simpson-Sears, at 547, [at D/3105 of C.H.R.R.], this Court spoke clearly as to the purpose of the Ontario Code, holding that the reach was wider than intentional discrimination:

It is the result of the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

The emphasis upon discriminatory effects was also held by this Court to be central to the purposes of the Canadian Human Rights Act: Bhinder, at p. 586, [at D/3095 of C.H.R.R.], per McIntyre J. (with whom all other members of the Court concurred on this point).

C.N.R. V. Canada (Canadian Human Rights Commission) (1987) 8 CHR D/4210 at 4226

In cases such as the one before me, where the Commission alleges systematic discrimination, the relationship between the allegedly unfair result and the prohibited ground must still be proven. Commonly, this is done by an admixture of evidence concerning the attitudes of supervisors, incidents which have occurred, etc, and analysis of the statistical pattern in the place of employment. This was the mode of analysis approved by the Supreme Court of Canada in C.N.R. v. Canada (Canadian Human Rights Commission) (supra). It may be, however, that such a case may be proven by the mere implausibility that a pattern of exclusion could be

generated by anything other than discrimination. That would be the case, for example, in a business enterprise which employed no women among its 5,000 staff; even if management were innocent of making any prejudiced comments and purported to hire entirely on the basis of merit, such a ratio of non-representation, properly documented and shown to be statistically relevant, would go a long way toward proving the relationship to the prohibited ground.

The case of Shakes v. Rex Pak Ltd. (1982) 3 C.H.R.R. D1001 at 1002 sets out the manner in which the Commission is to prove its case in employment complaints:

In an employment complaint, the Commission usually establishes a prima facie case by proving:

- a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired, and;
- c) that someone no better qualified, but lacking the distinguishing feature which is the gravamen of the Human Rights complaint subsequently obtained the position.

If these elements are proven, there is an evidentiary onus on the Respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred.

#### IV ANALYSIS

In applying these principles of law to the facts of the case before me. I am recognizant of the fact that racism, or ethnic prejudice, is a real part of Canadian life, constantly part of the experience of citizens who come from visible ethnic minorities. Academic studies such as the Frances Henry/Effie Ginzberg study, "Who Gets the Work" (Exh, C-25) make it abundantly clear that some employers, at least, discriminate against ethnic minorities in offering work.

The Henry/Ginzburg study documented discriminatory treatment of minorities by employers who had advertised in the positions available column in the newspaper. The study found that 48% of all employers treated callers with "minority" accents the same as those with "white Canadian" accents, while fully 52% of the employers told minority callers that a position had been filed when in fact it had not. (Exh. C-25, p. 48-50). With respect to those with "Indo-Pakistani" accents, 44% of all employers failed to offer interviews for open positions, a higher figure than for white ethnic callers, or those with West Indian accents.

The evidence of Dr. Bannerji extends and corroborates the conclusion of the Henry/Ginzberg study, and indeed, I have been presented with no empirical research which would support any other conclusion. As Doherty, J. put it in The Queen v. Carlton Parks (Unreported, Ontario Court of Appeal File C6626, released September 23, 1993:

"Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism." (at p. 29)

As the counsel for the Commission pointed out, it is rare in Ontario in the year 1993 for any employer to admit to racial prejudice, much less to an unwillingness to hire members of ethnic minorities due to their ethnicity. More often, unconscious discriminatory attitudes and conscious stereotypes will be denied by those so accused. Rather, the usual case of racial discrimination will be accompanied by protestations that nothing could be more untrue, than that the holder is a racist. I entirely accept the view urged upon me by the Commission that where ethnic prejudice is a reality, but a secret, unadmitted reality, a Board of Inquiry should look very carefully at the proffered explanations for failure to hire or failure to promote members of ethnic communities who are otherwise qualified for a position, but are not hired or promoted.

In the case before me, the Commission has indicated that it views this case as one of direct, systemic discrimination. While the essence of the Commission's case resides in the accumulated pattern of rejections of Mr. Lasani for promotion, a number of incidents were urged upon me

as circumstantial evidence that Mr. Lasani's job environment was, in fact, contaminated by racism. I propose to examine these elements of the evidence individually, keeping in mind, that it is their meaning when taken as a whole along with all the other evidence which is at issue.

### Goldie Verhaege

Mr. Lasani testified that one of his supervisors, Ms. Goldie Verhaege, harboured racist attitudes. He believed this primarily for two reasons. First, he once heard her make a derogatory comment about an East Indian client of the VRS office. Second, he disagreed with her evaluation of his work, as expressed in Performance Evaluations in the year of 1979-1981, which are found at Exh. 11, Doc. Book 7, Tabs 14-16.

At the outset, it is worth pointing out that the performance evaluations do not, according to the evidence, become part of the materials which are considered by a panel deciding who is to be selected in a job competition. Nor was there any evidence that Goldie Verhaege herself ever sat on any of the panels considering Mr. Lasani's requests for advancement. Thus, it is in my view somewhat unlikely that their contents could have had any impact on a decision to advance Mr. Lasani or not.

However, there does exist some possibility that the performance evaluations had an indirect effect. The evaluations are counter-signed by the Direct Services Manager, who was Mr. D. Vice. Mr. Vice testified that, while he routinely countersigned many evaluations, he did monitor them to a certain extent. Mr. Vice was, of course, one of the people who sat in the competition panels which denied Mr. Lasani advancement.

It may be, therefore, that Mr. Vice's opinion of Mr. Lasani had been affected by the impugned Performance Appraisals, and I propose to analyze them on that basis, to ascertain whether they reflect what Mr. Lasani believes to be Ms. Verhaege's prejudices.

To begin with, it seems to be very unlikely that Ms. Verhaege intended in any way to deflect Mr. Lasani from promotion. For example, the 1979 appraisal rates Mr. Lasani eight on a scale

of one to ten in seventeen of twenty categories. In three areas, Mr. Lasani is rated at five, which is defined in the key as denoting satisfactory work. Had Ms. Verhaege intended to insure that Mr. Lasani would have difficulty advancing, I find it difficult to believe that she would grade him as highly as she did.

Of course, it is possible that Mr. Lasani merited ten out of ten in all areas, and that Ms. Verhaege downgraded him due to prejudice and stereotyping. However, in reviewing the materials, it seems to me that Ms. Verhaege arrived at opinions which had some substantial basis in fact. For example, one of the areas in which his grade is only "satisfactory" is the area of liaison. Here, Ms. Verhaege writes as follows:

"Aquil has established satisfactory contacts with the various rehabilitation agencies. There has been minimal contact with the liaison agency, Crippled Children, and few referrals have resulted."

In his testimony before me, Mr. Lasani made few bones about the fact that he did not believe liaison work to be important, and that management's view was simply incorrect. He stated to me that liaison work simply resulted in more cases to be added to the backlog, an effect he felt to be inappropriate.

Regardless of whether he is right about this, it seems to me that Ms. Verhaege's comment reflects nothing more than management's view of this issue. It does not, I believe, reflect any ethnic prejudice to give only a satisfactory grade to someone who simply disagrees with the importance of the graded activity, and therefore gives it a low priority.

In other areas, Ms. Verhaege makes criticisms which I am unable to agree or disagree with. For example, in giving Ms. Lasani a "satisfactory" mark with respect to his writing skills, she says "An example of a good letter is the one to Mr. Winniski, Sept. 12. A poor letter is the one to Mr. Stewart, Sept. 22." Absent the letters themselves, I cannot conclude that comments such as this reflect ethnic bias, particularly when seen in the context of other, very favourable comments in the evaluation. For example, in evaluating Mr. Lasani's team participation, Ms.

Verhaege writes:

At case consultation meetings his contribution as an experienced counsellor is valued by the other members. He often offers a different perspective. Sometimes he is unable to attend, and at these times his contribution to case discussion is missed."

A similar example of fair-minded comment is seen at the Performance Evaluation at Book 7, Tab 14, p.3, where Ms. Verhaege goes out of her way to commend Mr. Lasani for making the unorthodox, but perfectly legitimate request that a client of his be granted an extra allowance to provide dog food for the client's Guide Dog. I believe that it would have been easy for Ms. Verhaege to omit this detail, without being criticized for being incomplete or less than thorough, had she been motivated, either consciously or unconsciously by ethnic stereotypes. She included the detail because it was a small example of good vocational rehabilitation work done by Mr. Lasani, and she wanted her evaluation to reflect both the positive and the negative.

Mr. Lasani also testified that he once heard Ms. Verhaege make an inappropriate remark about an East Indian client of the VRS office. In the absence of details, it is unclear to me how to judge the remark that was made, but I am prepared to accept Mr. Lasani's testimony that some inappropriate remark was in fact made. Still, I am persuaded that Ms. Verhaege was able to set aside her prejudices, if she had such, in judging Mr. Lasani's work. Rather, it is my view that her efforts to provide feedback to Mr. Lasani were entirely appropriate.

It is true that Ms. Verhaege graded Mr. Lasani lower than did his subsequent supervisor, Ms. Phyllis Tiffany. This, however, does not strike me as particularly reprehensible, or surprising. It is a common part of human experience to discover that some people, including some superiors, are more impressed with one's efforts than are others. Some teachers grade their students lower, and some higher, without any necessary implication that racial biases are operative. In fact, the evidence tends to show that Ms. Tiffany provided consistently high evaluations of her immediate staff. While I do not have a similar selection of Ms. Verhaege's evaluations of others, the state of the evidence does not satisfy me that Ms. Verhaege's evaluations are in any way based upon negative stereotypes.

Al Strang

Mr. Lasani also identified Mr. Al Strang as a superior who he felt to have racial prejudice towards him. This opinion was primarily based on two incidents. First, Mr. Strang made a public joke at Mr. Lasani's expense at the retirement party for an outgoing supervisor. As recalled by Mr. Lasani, the joke suggested that now a new supervisor would be inheriting the Aquil Lasani discipline problem.

It may be useful to point out here that Mr. Lasani appears to be a soft-spoken, scholarly gentleman of the old school. He is, in fact, the picture of a responsible, dedicated employee, and the last person who one would expect to be a discipline problem. Although it is difficult to be certain in the absence of more details, it seems likely to me that Mr. Strang's joke was in fact a kind of backhanded compliment to Mr. Lasani. Nonetheless, Mr. Lasani felt inappropriately singled out, since he was the only non-white in the VRS office at the time. Mr. Strang apparently noticed this, however, since he approached Mr. Lasani, and asked him not to be offended, as the speaker was expected to make some jokes. It seems to me that Mr. Strang's decision to ask Mr. Lasani not to be offended was a sensitive one, since the atmosphere at a retirement party may lead to jokes which would not be appropriate at the work place. In all the circumstances, I feel that his joke at Mr. Lasani's expense probably did not involve the expression of racial hostility or a desire to demean Mr. Lasani. Of course, repeated inappropriate joking can in fact be evidence of harassment, but I find no reason to believe that that was so in this case.

A second instance identified by Mr. Lasani occurred when Mr. Strang, angry that Mr. Lasani had failed to do something requested, had told the latter that he ought to get a hearing aid. As I understand the evidence, this remark was made to Mr. Lasani in private. In my view, while hurtful, a comment such as this falls well within the normal limits of employer-employee interactions in this province. There is absolutely nothing about it which suggests that it is underlain by ethnic prejudice or discriminatory stereotypes.

Overall, I have the impression that the Hamilton VRS workplace was not a place in which ethnic

prejudice was expressed. Rather, the relative paucity of incidents referred to by Mr. Lasani, in the course of a twenty year career there, as well as their marginal nature leads me to conclude that the atmosphere in the workplace was an appropriate one.

### The Pattern of Rejection of Applications for Promotion

As with the C.N.R. v. Canada (Canadian Human Rights Commission) case, supra, Mr. Lasani's complaint does not stand or fall on the basis of incidents such as these. In my view, the more compelling evidence on his behalf was the pattern of rejections, thirty in all, which resulted from his attempts to obtain advancement within the Ministry.

He testified that he first applied for advancement two years after entering the Ministry, submitting an application for VRS Supervisor, which was unsuccessful. He applied in 1977 for another VRS Supervisor opening, and was again unsuccessful. For reasons which are unclear to me, Mr. Lasani then set his sights on the position of Programme Supervisor. Fully his next ten applications were for this latter position, and he was unsuccessful in each and every attempt. Following a 1983 application for VRS Supervisor which was a developmental opportunity, he applied for Programme Supervisor positions in the years of 1984-85.

The first question which arises is whether the Commission has established that Mr. Lasani was qualified for either of these positions. In my view, the Commission has not shown that Mr. Lasani was qualified to be a VRS Supervisor in 1973, nor in 1977. I leave aside entirely the question of whether he was qualified in 1983 and subsequently, for the moment.

There is a relative paucity of documentation with respect to these early years, but in view of the Performance Evaluations which are evidence before me, and which, in large part I accept, I believe that Mr. Lasani was probably not the best of the candidates for those positions. I am more firm in my opinion with respect to the 1973 application, since Mr. Lasani had been in the Ministry's employ only two years. By 1977, he approached the average level of experience at the level VRS counsellor, but still had, in 1979, some problems associated with his work.

By the same token, it is my view that the Commission has not established that Mr. Lasani was qualified for the position of Programme Supervisor. It is very clear from the evidence of Annette Twist, that Programme Supervisor is a senior management position. A simple comparison of the job descriptions for VRS Counsellor and Programme Supervisor indicates clearly that the former provide social services direct to the public, while the latter involves the monitoring of the work of outside agencies which receive funding from the Ministry. There is little to suggest that the skills acquired in the VRS Counsellor position are more than marginally useful in the latter. In my view, wholly different skills would be appropriate to the successful applicant for a Programme Supervisor's position.

While Mr. Lasani told me that he began to apply for Programme Supervisor's positions in 1977 because he felt that he was qualified for the job, I believe he was not so qualified. The evidence suggests that he had only a vague idea of what the job entailed, and that he was careless as to what qualifications were required. For example, he applied, without distinction, for jobs as a Programme Supervisor in the area of Children's Services, where he had absolutely no experience whatsoever, and in adult services, where his VRS Counsellor work would at least have exposed him to one of the many programmes which the Ministry operates.

Fundamentally, in my view, the Programme Supervisor requires a person with deep knowledge of the entire range of social services offered by the Province of Ontario, and other non-governmental agencies. While Mr. Lasani has impressive educational qualifications, including educational experience both in India and Ontario, those degrees, in my view, do not guarantee that he possessed the knowledge and judgment that a Programme Supervisor requires.

My conviction that this is so is also based upon observation of Mr. Lasani as a witness. I am convinced that he testified truthfully, and that he evinced substantial strength of character in refusing to embellish the evidence. On the other hand, he did not respond quickly and clearly to all questions, particularly on cross examination, and he sometimes misunderstood the import of questions. For example, even though possessed of a law degree, he was unable to answer the question in the form "Does Ms. Verhaege say X about you?" directly, but rather would

answer by saying that he did not agree that X was true. Although I was required to caution him for being argumentative, it is my view that he simply misunderstood the questioning.

Witnesses Vice, Streiker, and Cornish testified that Mr. Lasani did not provide detail in response to questions put to him during the interviews, and that he was vague in his responses. The notations of some of the other panellists in the two panels which are fully documented also support this contention.

I therefore find that, with respect to the VRS Supervisor positions of 1973 and 1977, the Commission has not met its onus of showing that Mr. Lasani was qualified for those positions. Nor do I believe that the Commission has offered a showing that Mr. Lasani was qualified for any of the Programme Supervisor positions for which he applied.

However, I do believe that the Commission has met the onus of showing that from the year 1983 onward, Mr. Lasani was qualified for a VRS Supervisor position. First of all, comparison of the job descriptions leads me to believe that experience in the former position is directly relevant to success in the latter. By this time, Mr. Lasani was a very experienced counsellor, who had shown through his work that he had an ability to reorganize the work of the office, devise flow charts which other counsellors could use, and so on. Supervisor Noreen Toye had written several notes to Mr. Lasani, asking his opinion on difficult issues which had arisen within the office, and on which she wanted his input during the year 1983 (Exhibits 3(g) (i) to 3(g)(v). Furthermore, Mr. Lasani's performance evaluations had been on an upward trajectory, and were now consistently excellent.

While it is true, as Ms. Gottesman argued for the Respondent, that one would expect a person with twelve years experience to have mastered the job, it is also true, in my view, that this mastery would have been an important component of the skills required for the position of VRS Supervisor.

It thus falls to the Respondent Ministry to justify its refusal to advance Mr. Lasani to the

position of VRS Supervisor on any of the later occasions he applied. According to Mr. Lasani's evidence, which was uncontradicted, he applied in October 1983 for a one year developmental opportunity designated AD-28-83. He also applied for a position designated AD-19/86, in July 1986. He applied in December 1987, January 1988, and September 1988 for VRS Supervisors positions, the first of which had no designation, the second of which was designated AD-61/88, and the third AD-55/88. As well, he applied for two positions in which competitions were not held, a three month position in St. Catharines in December, 1987, and a 1987 developmental position in Hamilton.

With respect to the first of these competitions, AD-28/83, the successful candidate was Phyllis Tiffany. Ms. Tiffany was Mr. Lasani's supervisor at the time she applied for this position, and based upon that fact, plus her educational background and very obvious intelligence, which were evident during her testimony before me, I find it wholly justified that Ms. Tiffany was offered this position before Mr. Lasani. I believe that she was more qualified by a substantial margin.

The VRS Supervisor competition designated AD-19/86 was won by Alan Felton, who, like Ms. Tiffany, is of European white extraction. I have been provided with Mr. Felton's entire personnel file, and had the benefit of Mr. David Vice's testimony concerning Mr. Felton. He had joined the Ministry in 1975, as a Social Work Supervisor, Level One, in the Niagara Falls Office. He held a Master's Degree in Social Work, had one year of law school, and had worked for several years for the John Howard Society before joining the Ministry. In 1985, due to amalgamation, the Niagara Region became part of the Hamilton area. Mr. Felton's success in the 1986 competition gave him a job which was only marginally different from the one which he had held in Niagara Falls over the previous ten years. His performance appraisals over those years show a steady increase in his ability to manage and motivate staff, and to provide direction to the enterprise of the office. As early as 1975, Mr. Felton was providing management with analysis as to the overall function of the VRS Supervisor within the Niagara Peninsula (see Document Book 4, Tab 2, pp.333-336).

The impression that Mr. Felton was an exceedingly good candidate is enhanced when reference

is made to the full competition file, which is Exhibit 1 to the inquiry. Of the six persons invited to the interviews for VRS Supervisor, Hamilton, three were relatively long-service VRS counsellors, including Mr. Lasani, two were not employed by the Ministry, and one, Mr. Felton was a VRS Supervisor, Niagara Falls, of approximately ten years standing. A written examination question, "What is your Philosophy for the Delivery of Social Work Services?" is included in the materials, and one can compare Mr. Felton's written answer at pp.17-18 of Exhibit 1, with Mr. Lasani's at pp. 34-35. While Mr. Felton's answer stresses that the delivery of social services must be viewed as a right, to be delivered without demeaning the clients, Mr. Lasani's highlights quickness, and deplors "red-tape bureaucracy". As I understand the grading of this question, Mr. Felton received an "8", while Mr. Lasani received a "3". In my view, these grades reflect fairly on the quality of the written answer, and allow me to be more confident that the rest of the grading, which is done in the basis of oral answers which are nowhere reproduced verbatim, are also fair and unbiased.

In consequence, I conclude that Mr. Felton was clearly the superior candidate in this competition.

The next two competitions, the December 1987 VRS Supervisor position (Developmental) which had a one year duration, and the September, 1988 competition, were won by Brian Marston. Mr. Marston's personnel file is found at Tab.1, Exh. 12. Mr. Marston joined the Ministry as a VRS counsellor in 1975 (p.169). he had a Bachelor of Arts in Psychology, but no higher degree. His earlier performance reviews indicate some difficulties in adjusting to his position, but later performance evaluations speak of him in glowing terms. For example, a performance evaluation signed by Mr. Helmut Kosempel on June 30, 1980, Exh. 1, pp.60-67, summarizes the supervisor's view on page 66:

*"Brian has made very solid gains on his performance as a counsellor this past year. The quality of his written work has improved noticeably, his case movement is excellent, his judgment around client programme decisions is good, and his own confidence as a counsellor has increased. I am very pleased with Brian's performance this past year, and will expect that further gains will continue to be made."*

Later performance appraisals by Supervisor Phyllis Tiffany continue to reflect improvement, both in 1985 and 1986. For example, her comment on overall performance dated June, 1985 is as follows:

*"Very good performance, both in quality and quantity of work. Reliable, dependable, relates well to clients."*

Later, the analysis includes the recommendation that "Brian may want to consider special assignment or other developmental moves to allow for continued growth and development".

Under promotability she writes: *"Has the skills to work in a more responsible position"*.

On paper, there is little to choose between the two men, Mr. Lasani and Mr. Marsden, other than the fact that Mr. Lasani has two advanced degrees which he completed, plus substantial work on an M.B.A. Mr. David Vice testified that the panel evaluating the contenders was impressed by the fact that Mr. Marston had been counsellor in the small Brantford satellite office for many years. In such small office, he said, a counsellor tends to get particularly well-rounded experience. For example, in larger offices, the eventual job placement of the vocationally rehabilitated person is done by specialists, whereas in Brantford, Mr. Marston had had to do this part of the process himself. Thus, in comparison to Mr. Lasani, who was doing a 1/2 caseload along with intake work, which management did not consider challenging, Mr. Marston appeared to have broader exposure to all aspects of VRS work. As well, Mr. Marston had taken the highly-touted Mohawk College course in hands-on management techniques in the Social Services, a course Mr. Vice considered to have a proven track record in producing effective managers.

I am unable to say that Mr. Lasani was more qualified for this position than was Mr. Marston. I accept Mr. Vice's evaluation of the advantages which may accrue to a counsellor who learns all of the processes of a small office, compared with a counsellor who is relatively specialized, and reject the suggestion that it was a pretext.

The only aspect of their background which clearly favours Mr. Lasani is the fact that he has

several degrees from India, plus significant course work toward an M.B.A. at McMaster University. Against this can be set the fact that neither a law degree or a M.B.A. is directly relevant to the position of VRS Supervisor. Furthermore, Mr. Lasani completed his formal education in 1967, while Mr. Marston's more humble Mohawk College course was completed in the mid-80's. Also, the Ministry has an announced policy which de-emphasizes academic credentials, in favour of direct assessment of candidates on the basis of their individual performance, both on the job and in interview situations.

With respect to interviews, we have no direct information about Mr. Lasani's performance at this interview compared with Mr. Marston's. Mr. Lasani himself purported to remember all thirty interviews, and graded himself highly on each, whereas witnesses such as Mr. Vice and Mr. Cornish could not clearly distinguish between interviews, but had a general impression of Mr. Lasani's performance as quite undistinguished.

On the whole, and after having observed Mr. Lasani give evidence over the course of several days, I am satisfied that this impression of Mr. Lasani's interview abilities is well-founded. While I have not had the opportunity of comparing his abilities in this regard with those of Mr. Marston, I have no reason to distrust the general view of the management witnesses that Mr. Marston performed better than Mr. Lasani. I see no evidence that management's selection of Mr. Marston over Mr. Lasani was in any way related to Mr. Lasani's ethnicity. Rather, I accept Mr. Vice's characterization of the reasons which led to the hiring of Mr. Marston for the VRS Supervisor's position. I believe this conclusion applies for both the competition for the temporary position of December 1987, and for the permanent one of September 1988.

There were three other positions for which Mr. Lasani applied, and for which he was not hired. In fact, the first two of these were three month temporary appointments at the Niagara Regional office, which required a VRS Supervisor on an emergency basis, and the eventual full-time position at the office which was decided by competition, VRS 61/88.

As noted, the first two of these were done by appointment rather than by full competition. As

I understand the evidence, some time is required for a position to be advertised, applications solicited and analyzed, and interviewing scheduled and completed. When a position is vacant due to such factors as illness or death, a short-term appointment is made by management to insure that there will be as little "down-time" as possible in a given office.

In the first instance, Ms. Liz Boojarv was appointed, even though management knew that Mr. Lasani was interested in the position, for a three month period. Ms. Boojarv's personnel file is found at Tab 1, Exhibit 14 (Doc. Book 6). Ms. Boojarv had a Master's degree in sociology and an M.B.A. in Human Resource Management and Labour Relations. She had been working as a VRS counsellor for three years, and had been in the Ministry since 1982. Her work in the Ministry prior to being hired for the VRS counsellor's position involved work in the Dundas area, including numerous outlying rural communities. She had been employed prior to that by the Brantford & District Association for the Physically handicapped. Her supervisor during the period prior to her joining VRS, Mr. Banning, had given her excellent references. Once she became a VRS counsellor, Mr. Boojarv continued to obtain excellent performance appraisals. Phyllis Tiffany, for example, had occasion to comment on her abilities in March, 1985. Under the heading of "Promotability" she wrote: *"Learns quickly. High initiative and motivation. Has the skills, ability, and interest to function in a more responsible position"*.

Mr. Vice testified that management wishes to minimize disruption at the Niagara Regional office, and wished to place an energetic self-starter there. He stated that Ms. Boojarv had a demonstrated ability to get a team up and running on short notice. Mr. Vice stated that he was well-satisfied with her performance, and she was in fact subsequently hired by the London District Office as a VRS Supervisor. Her personnel file confirms this, and serves to establish that she has performed in that job with distinction.

Given all these circumstances, I am unable to conclude that Mr. Lasani was more qualified than Ms. Boojarv. Certainly, there is no evidence that ethnic stereotyping played any role in the decision to offer this short-term position to Ms. Boojarv over Mr. Lasani.

The next position was a subsequent three month appointment as VRS Supervisor, Niagara Regional Office. On this occasion, Mr. Gavin Toumishey was appointed over Mr. Lasani. On paper at least, Mr. Lasani was substantially more qualified than was Mr. Toumishey. Mr. Toumishey had a Bachelor's degree in social work, while Mr. Lasani had much more impressive educational background. Mr. Toumishey had been employed as a VRS counsellor for only two years, to Mr. Lasani's 15.

Mr. Vice explained this decision as being due to two factors. First, Mr. Toumishey worked in the Niagara Regional Office, and was familiar with its operations and procedures. Secondly, at a time when there was a difficult situation in the Welland satellite office due to the personal difficulties of a staff member there, Mr. Toumishey had done "double duty", completing his own caseload and the work of his associate. He was, Mr. Vice testified, in effect in charge of that sub-office.

I believe that Mr. Vice has testified truthfully as to the reasons management preferred Mr. Toumishey. It is not for me to weigh the precise value of having someone familiar with the Niagara Falls Office as VRS Supervisor there. It may be, in fact, that management is wrong in its granting such substantial weight to this factor. But, in the absence of any reason to believe it to be a pretext, I can only conclude that there was no discrimination on the basis of a prohibited ground.

The situation is similar for the final competition, VRS Supervisor (AD/61-88), which was the permanent position at the Niagara Regional Office. The successful candidate was Gerry Toullo, a white female. Mr. Vice testified that Ms. Toullo had exceptional liaison skills, was able and energetic, and was a candidate from within the Niagara Regional Office, familiar with its systems and personnel. For reasons similar to those concerning Mr. Toumishey, I am unwilling to conclude that the decision to offer the position to Mr. Lasani reflected any factors other than those mentioned by Mr. Vice. There is no evidence that ethnic stereotyping had any role whatsoever in this decision.

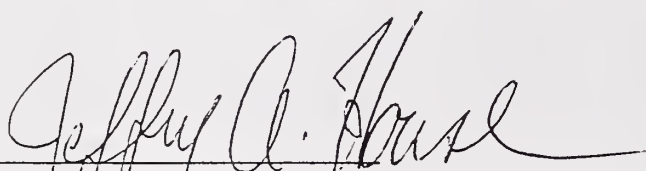
The evidence as to the representation of ethnic minorities within the ranks of the employees of the Respondent Ministry has also been extremely useful to me in the light it sheds upon this case. Overall, the evidence is clear that the Ministry has hired minorities at a rate congruent with what would be expected given their general representation in the Hamilton area. While such statistical information can seldom be determinative in a given instance, a person who asserts ethnic discrimination will be helped in cases in which there is a significantly significant disequilibrium between the number of minority candidates hired and their representation in the general population. By the same token, a person who asserts that he has been refused promotion because of racial or ethnic factors may have difficulty proving the relationship to the prohibited ground when other members of his racial minority have apparently not faced similar difficulties in obtaining promotion.

#### V. CONCLUSION

I find that Mr. Aquil Lasani was not refused promotion on the basis of any prohibited ground. Rather, with respect to the position of Programme Supervisor, I find that he was not qualified for the position at any time. With respect to the position of VRS Supervisor, I find that he was qualified for VRS Supervisor position at least from the year 1983 onward until he retired from the Ministry. However, having examined each of the instances in which others were promoted to a VRS Supervisor's position to which Mr. Lasani aspired, I find that, in each case, the successful candidate was more qualified than was Mr. Lasani. In my view, the only arguable exception to this conclusion was the case of Mr. Gavin Toumishey, who appeared on paper to be less qualified than was Mr. Lasani. However, given the short term nature of that position (three months), I find that management was justified in seeking a person familiar with the Niagara Regional Office. If Mr. Toumishey is in fact less qualified than Mr. Lasani, I find that management assigned him this short-term position due to factors entirely unrelated to any prohibited ground, including their apparent appreciation of his effort to do two jobs at a time when the Welland satellite office was under pressure due to personal difficulties suffered by one of the employees there.

VI    ORDER

Since I have found that no violation of the Human Rights Code has occurred, I make no order.

  
JEFFERY A. HOUSE  
Board of Inquiry

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